

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35600

STATE OF IDAHO,)	2009 Unpublished Opinion No. 702
)	
Plaintiff-Respondent,)	Filed: December 1, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
MICHAEL WAYNE JACKSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Idaho County. Hon. John H. Bradbury, District Judge.

Judgment of conviction for aggravated assault, affirmed.

Aherin, Rice & Anegon, Lewiston, for appellant. Sarah A. McDowell argued.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent. Mark W. Olson argued.

PERRY, Judge Pro Tem

Michael Wayne Jackson appeals from the judgment of conviction and sentence entered upon the jury verdict finding him guilty of aggravated assault, Idaho Code §§ 18-901(b) and 18-905(a). We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

On July 6, 2007, Jackson, Alex Hagen, and four other men were camping in a remote area in Idaho County near Maud Lake. After the group had dinner, Hagen went down to the lake to go fishing while it was still light out. Shortly after Hagen left, Jackson decided that he wanted to go shoot a pistol. One of the men had brought a .44 Magnum revolver, which Jackson took down to the lake to shoot. Jackson fired all six rounds. Hagen was in a raft on the lake and testified that on the third, or perhaps the fourth shot, he was struck in the abdomen. Hagen testified that after he had been struck, “[Jackson] proceeded shooting.”

Jackson was charged with aggravated assault. Jackson moved for a judgment of acquittal pursuant to Idaho Criminal Rule 29, which was denied. After the jury returned a guilty verdict, the district court imposed a unified sentence of five years, with two and one-half years determinate. Prior to sentencing, Jackson filed a “motion to strike impact statements,” which was also denied. Jackson appeals.

II.

ANALYSIS

Jackson raises several issues on appeal. First, Jackson claims that the district court abused its discretion by permitting a sheriff to testify on the trajectory of bullets once they hit a body of water. Second, Jackson argues that the district court abused its discretion in denying his motion for judgment of acquittal. Third, Jackson asserts that certain statements made by the prosecutor during closing argument constituted prosecutorial misconduct that rose to the level of fundamental error. Fourth, Jackson argues that the cumulative effect of all the errors deprived Jackson of a fair trial. Fifth, Jackson contends that the district court erred in admitting testimony and letters of non-victims at sentencing. Finally, Jackson argues that the district court abused its sentencing discretion by imposing an excessive sentence.

A. Expert Testimony

Jackson contends that the district court abused its discretion when it allowed Detective Skott Mealer to testify regarding his experience with how bullets react when they hit water. Jackson argues that the State failed to qualify Mealer as an expert under Idaho Rule of Evidence 702. The State counters that Jackson did not object on these grounds below and, therefore, has failed to preserve this issue for appeal.

At trial, the prosecutor asked Mealer whether he had “particular experience in bullets and how they travel after hitting water.” Defense counsel objected stating, “Your Honor, I am going to renew my objection.” While stating the specific ground for objection will preserve the objection for appellate review, I.R.E. 103(a)(1), renewing an unspecified objection does not preserve an issue for appeal. Jackson maintains that this Court may look to the context surrounding the objection for its basis, but counsel at oral argument conceded that the basis was unclear from the record. This Court will not search the record for error. *In re Gibbar*, 143 Idaho 937, 946, 155 P.3d 1176, 1185 (Ct. App. 2006). Error is never presumed on appeal and the burden of showing it is on the party alleging it. *Stewart v. Sun Valley Co.*, 140 Idaho 381, 384,

94 P.3d 686, 689 (2004). Furthermore, an objection on one ground will not preserve a separate and different basis for excluding the evidence. *State v. Norton*, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000). Because Jackson did not make a specific objection to Mealer's testimony on the grounds now asserted on appeal, he has failed to preserve the issue for appeal. Therefore, we decline to address it further.

B. Motion for Judgment of Acquittal

At the close of the State's case, Jackson moved, pursuant to I.C.R. 29, for entry of a judgment of acquittal. The district court denied the motion. Jackson argues that this was error.¹ The test applied when reviewing the district court's ruling on a motion for judgment of acquittal is to determine whether the evidence was sufficient to sustain a conviction of the crime charged. *State v. Fields*, 127 Idaho 904, 912-13, 908 P.2d 1211, 1219-20 (1995). When reviewing the sufficiency of the evidence where a judgment of conviction has been entered upon a jury verdict, the evidence is sufficient to support the jury's guilty verdict if there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We do not substitute our view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

Jackson first argues, citing the *corpus delicti* principle, that his extrajudicial statements to law enforcement were not "clear admissions" and that there were no corroborating facts, absent those admissions, to support a conviction of aggravated assault. *Corpus delicti*, meaning "the body of a crime," is a common law principle that requires the State to establish some

¹ On appeal, Jackson asserts, as two separate issues, that the district court erred in denying his motion for judgment of acquittal and that there was insufficient evidence for a finding of guilt. As both of Jackson's arguments hinge on the sufficiency of the evidence, they will be addressed together.

corroborating evidence that a crime occurred independently from a defendant's confession. *See* BLACK'S LAW DICTIONARY (8th ed. 2004). As the Idaho Supreme Court has stated:

[S]ince 1902 the law in Idaho has been that while an extrajudicial confession or admission, standing alone, is not sufficient to convict an accused, only slight corroborating facts are necessary to uphold the conviction. The corroborating evidence need not be sufficient to establish each element of the corpus delicti. *State v. Urie*, 92 Idaho 71, 437 P.2d 24 (1968).

State v. Tiffany, 139 Idaho 909, 915, 88 P.3d 728, 734 (2004). The State cannot, therefore, prove its case exclusively on the defendant's admission that the crime occurred. *See State v. Roth*, 138 Idaho 820, 823, 69 P.3d 1081, 1084 (Ct. App. 2003). However, only slight corroboration is required. *Tiffany*, 139 Idaho at 915, 88 P.3d at 734.

In this case, Jackson's admissions came through the testimony of the two investigating officers. The officers testified that Jackson acknowledged he was not trying to hit Hagen, but that he was trying to scare him. Jackson told the officers "he was shooting in different areas near Mr. Hagen to scare him." Jackson also told the officers "he saw a bullet strike the lake 100 feet in front of the raft directly in line with Mr. Hagen." Jackson also admitted to having fired all six rounds. Jackson acknowledged that he had "plenty or quite of bit" of alcohol. Jackson contends that because there were no witnesses to the incident besides Jackson and the victim, Hagen, who was several yards away, there is no corroborating evidence that Jackson pointed the gun at Hagen and, therefore, the evidence was insufficient to sustain a conviction of aggravated assault. This argument is belied by the record.

Hagen's testimony alone provided more than "slight corroborating facts" to Jackson's own admissions. *See Tiffany*, 139 Idaho at 915, 88 P.3d at 734. Hagen testified that while he was fishing in the raft out on the lake, he realized he was being shot at. Hagen saw Jackson on the shore. Hagen was "worried and scared because [he] realized that [Jackson] was shooting in [his] direction." Hagen yelled at Jackson "to quit shooting." Jackson yelled something back to Hagen, although Hagen could not remember what he said. After the third or fourth shot, Hagen said, "hey, I'm hit And [Jackson] proceeded shooting." Hagen testified that after he had been shot, he was getting worried and scared because "[he] didn't have anywhere to go, just sitting out there hoping that another one wouldn't get [him]." Hagen heard a total of six shots, and he testified that he saw at least two shots hit the water near him. Hagen also testified that he

yelled out that he had been “hit” after the fourth and sixth shots. Hagen testified that during the shooting he had a “great sense of fear” and “thought [his] life was in danger.”

In addition to Hagen’s testimony, the other men on the camping trip also testified that Jackson took the revolver down to the lake. The men testified that they heard several gunshots as well as Hagen yelling that he had been shot. Each of the men also testified to seeing Hagen’s bullet wound.

Jackson maintains, however, that while the facts may support a charge of criminal negligence, they do not show that Jackson made an “intentional, unlawful threat by word or act to do violence” to Hagen. Jackson also argues that because the officers’ testimony regarding bullet ricochet and trajectory was not based on professional experience and because the State failed to establish a motive for the shooting, there was insufficient evidence for the jury to find that the State met its burden of proof on the element of intent. Intent, however, may be inferred from the defendant’s conduct or from circumstantial evidence. *State v. Pole*, 139 Idaho 370, 373, 79 P.3d 729, 732 (Ct. App. 2003). Jackson knew that Hagen was out on the lake and intentionally fired a gun in his direction. Jackson saw one of the bullets hit the water directly in front of Hagen, and he continued to shoot. Even after Hagen had been hit and yelled at Jackson to stop shooting, Jackson continued to shoot. These facts demonstrate that the jury had substantial evidence upon which they could infer Jackson’s intent. In addition, Hagen’s testimony clearly demonstrates that Jackson’s conduct created a well-founded fear in Hagen that “[his] life was in danger.” Therefore, there was substantial evidence upon which a reasonable trier of fact could have found that the State sustained its burden of proving the essential elements of aggravated assault beyond a reasonable doubt. *See Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

C. Prosecutorial Misconduct

Jackson next contends that the prosecutor committed misconduct during his closing argument when, after reviewing the trial evidence, he stated:

Are you intending to threaten someone, intending to scare them if you point a weapon? Yes. If you shoot at them, you are intending to threaten them. When you shoot six times at them are you intending to threaten them? Yes.

Jackson did not object to the prosecutor’s argument, but now contends on appeal that the prosecutor’s statements were inconsistent with Idaho law. Because Jackson did not object at

trial, he argues that the prosecutor's statements constitute prosecutorial misconduct rising to the level of fundamental error.

Closing argument serves to sharpen and clarify the issues for the jurors and to help them remember and interpret the evidence. It gives each party an opportunity to present its view of what the evidence proves or fails to prove. *Herring v. New York*, 422 U.S. 853, 862 (1975); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007); *State v. Reynolds*, 120 Idaho 445, 450, 816 P.2d 1002, 1007 (Ct. App. 1991). Counsel are traditionally afforded considerable latitude to discuss fully, from their respective standpoints, the evidence, inferences and deductions arising from the evidence. *State v. Payne*, 146 Idaho 548, 566, 199 P.3d 123, 141 (2008); *Phillips*, 144 Idaho at 86, 156 P.3d at 587. It is well established, however, that it is not a proper use of closing argument for an attorney to appeal to emotion, passion or prejudice of the jury through use of inflammatory tactics. *Phillips*, 144 Idaho at 86-87, 156 P.3d at 587-88.

Prosecutorial misconduct in closing argument rises to the level of fundamental error when it is calculated to inflame the minds of jurors and arouse prejudice or passion against the defendant or is so inflammatory that the jurors may be influenced to determine guilt on factors outside the evidence. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct. App. 2003); *State v. Lovelass*, 133 Idaho 160, 167, 983 P.2d 233, 240 (Ct. App. 1999).

Jackson contends that the prosecutor's statement "Are you intending to threaten someone, intending to scare them if you point a weapon? Yes," is inconsistent with Idaho law because it "led the jury to believe that simply pointing a weapon at someone constitutes and fulfills the intent element of aggravated assault." Jackson argues that because an individual can intentionally point a weapon at someone without malice, I.C. §§ 18-3305 and 18-3306, pointing or aiming a gun at someone is not inherently a threat. The prosecutor's argument, when taken in context, is simply appealing to the jury to make the inferences from the evidence that Jackson, by his conduct, intentionally threatened to do violence to Hagen, that he had the apparent ability to do so, and that Jackson's actions created a well-founded fear in Hagen that violence was imminent. See I.C. §§ 18-901(b), 18-905(a). The prosecutor referred to the specific circumstances of the case and the specific conduct of Jackson. The prosecutor's statements presented a reasonable argument based upon inferences that could be drawn from the evidence. Thus, Jackson has failed to demonstrate prosecutorial misconduct, let alone misconduct rising to the level of fundamental error.

Finally, Jackson argues that the cumulative error doctrine requires reversal of his conviction. However, Jackson has failed to demonstrate on appeal that any errors occurred. Accordingly, the doctrine does not apply.

D. Sentencing Evidence

Jackson claims that his Fourteenth Amendment right to due process was violated by the district court's reliance on certain testimony given at sentencing as well as letters submitted to the court from non-victims. Jackson argues that because the testimony and letters, which were not offered by "victims" under I.C. § 19-5306, commented on Jackson's character and provided opinions on an appropriate punishment, they were unduly prejudicial and violative of the Fourteenth Amendment. The State asserts that because Jackson did not object to the testimony at sentencing, he has failed to preserve his claim. The State also contends that Jackson has not shown that the district court abused its discretion by considering the letters submitted to the court.

1. Victim Impact Evidence

Prior to sentencing, Jackson filed a "motion to strike impact statements," wherein he argued that specific statements submitted by Hagen's parents, as well as another individual, be struck from the record because they were not victims. Several letters were also submitted by other members of Hagen's family, family friends and neighbors, as well as Jackson's former girlfriend and some of her family a few days before sentencing. At the sentencing hearing, Jackson moved to "broaden" his motion to encompass all of the statements received by the district court after the PSI had been completed. Jackson argued that the statements were not admissible because (1) the authors were not victims, (2) the content of the statements was unconstitutional, and (3) the statements were not relevant. Jackson acknowledged that Hagen was a victim, and the district court agreed. The district court also found that Hagen's parents were victims. As to the other individuals, the court held that it could consider the statements of non-victims as evidence in weighing the sentencing factors. Thus, the court denied the motion.

Jackson contends that because the testimony and letters offered at sentencing, other than Hagen's testimony and letter, were not submitted by "victims" under I.C. § 19-5306, the district court erred in considering that evidence. Because the district court found that the only individuals who qualified as victims were Hagen and his parents and because Jackson does not dispute that Hagen was a victim, we need not address Jackson's arguments that the other

individuals are not victims. Thus, we must only determine whether Hagen's parents qualify as "victims" under I.C. § 19-5306.

For purposes of I.C. § 19-5306, "victim" is defined as "an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime or juvenile offense." I.C. § 19-5306(5)(a). Mrs. Hagen testified regarding the financial and emotional harm that she and her family suffered as a result of Jackson's actions in shooting her son. With respect to financial harm, Mrs. Hagen testified that there were costs in terms of medical bills, travel and motel expenses, and lost time from work for both herself and her husband. This testimony demonstrated that Hagen's parents suffered direct financial harm as a result of Jackson's criminal offense. Thus, they were victims within the meaning of the statute.

Regarding Jackson's contention that Hagen's parents could not comment on Jackson's character or recommend an appropriate sentence, such limitations are restricted to victims in capital cases. *See State v. Matteson*, 123 Idaho 622, 625, 851 P.2d 336, 339 (1993) (Because I.C. § 19-5306 does not include any limitations that would prevent a victim of a non-capital crime from sharing his or her sentencing recommendation with the trial court, such a statement is permissible.). Furthermore, Idaho's Constitution grants crime victims, as defined by statute, the right "[t]o be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result." IDAHO CONST. art. I, § 22; *see* I.C. § 19-5306(1)(e) (containing similar language). Thus, Hagen and his parents had a constitutional right to be heard at Jackson's sentencing and were not precluded from commenting upon Jackson's character or recommending an appropriate sentence.

2. Non-Victim Evidence

Except for Hagen and his parents, the other individuals were not victims and the district court did not treat them as such. Rather, the district court concluded that it could consider the statements of non-victims as evidence in weighing the sentencing factors. Thus, we must determine whether the district court's admission of the non-victim evidence constituted an abuse of discretion.

While Jackson complains of the testimony and letters submitted by the State, Jackson's family and friends also submitted letters to the court, which were attached to the PSI. These letters referred to Jackson as a hard worker, family oriented, compassionate, and caring. Most of these letters described the incident with Hagen as an "accident," and some of the letters

requested leniency in sentencing. It was in response to these letters that the State submitted letters and elicited testimony rebutting Jackson's mitigating evidence. The letters addressed the impact of the crime on Hagen and his family and also commented upon Jackson's character, specifically with respect to domestic violence and alcohol abuse.

We note that the district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing. *State v. Johnson*, 101 Idaho 581, 583, 618 P.2d 759, 761 (1980); *see also State v. Cortez*, 135 Idaho 561, 566, 21 P.3d 498, 503 (Ct. App. 2001). It is fundamental that a sentencing court may properly conduct an inquiry broad in scope, largely unlimited, either as to the kind of information it may consider or the source from which it may come. *Matteson*, 123 Idaho at 625, 851 P.2d at 339. "[T]he sentencing judge is presumably able to ascertain the relevancy and reliability of the broad range of information and material which may be presented to it during the sentencing process and to disregard the irrelevant and unreliable." *Johnson*, 101 Idaho at 583, 618 P.2d at 761; *State v. Pierce*, 100 Idaho 57, 58, 593 P.2d 392, 393 (1979). Having reviewed the transcript of the sentencing hearing, it is apparent that the parties were largely unlimited in submitting their evidence and presenting their arguments. Thereafter the district court exercised its broad discretion in assessing what weight, if any, to give such evidence. Jackson has failed to demonstrate an abuse of that discretion on the part of the district court.

E. Excessive Sentence

Finally, Jackson contends that his sentence was excessive. Sentencing is a matter for the trial court's discretion. Both our standard of review and the factors to be considered in evaluating the reasonableness of the sentence are well established and need not be repeated here. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). Applying these standards, and having reviewed the record in this case, it cannot be said that the district court abused its discretion.

III.
CONCLUSION

Jackson failed to preserve for appeal his claim regarding expert testimony because he did not make a specific objection at trial. The district court did not err in denying Jackson's motion for a judgment of acquittal. There was substantial evidence upon which the jury could have found that Jackson committed aggravated assault. Jackson failed to demonstrate prosecutorial misconduct. The district court did not abuse its discretion in admitting the testimony and letters at sentencing nor did it abuse its sentencing discretion. Accordingly, Jackson's judgment of conviction and sentence are affirmed.

Judge GUTIERREZ and Judge MELANSON, **CONCUR.**